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No. 88-1380

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE OGLALA SIOUX TRIBE AND
THE ROSEBUD SIOUX TRIBE, PETITIONERS

v.

THE UNITED STATES AND
THE SIOUX TRIBE OF INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that counsel for the Sioux Tribe of Indians properly entered into a factual stipulation with government counsel concerning the amount of certain offsets to the Sioux's damage award, or whether that stipulation was instead a settlement agreement that the various Sioux Tribes had to ratify.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 862 F.2d 275. The opinion of the Claims Court (Pet. App. 17a-40a) is reported at 14 Cl. Ct. 94.

JURISDICTION

The judgment of the court of appeals (Pet. App. 50a) was entered on November 23, 1988. A rehearing petition was denied on December 28, 1988 (Pet. App. 51a). The petition for a writ of certiorari was filed on February 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1950, Sioux Indians filed a claim with the Indian Claims Commission seeking compensation for the lands in North and South Dakota, Nebraska, Wyoming, and Montana that the United States acquired pursuant to an 1868 treaty. The claim was filed in the name of the Sioux Tribe of Indians, which has not existed as an entity since 1890, as the representative of the eight present-day Sioux tribes, each of which has its own reservation. The Commission concluded in 1978 that the land was worth more than $45 million at the time it was ceded to the federal government and that the government's payment to the tribe had therefore been deficient by nearly $44 million. The Commission completely rejected the government's claims for offsets, which totalled $65 million. It accordingly ordered the government to pay the Sioux $43,940,700. *Sioux Tribe* v. *United States*, 42 Indian Cl. Comm'n 214 (1978). The Court of Claims sustained the Commission's evaluation of the lands, but remanded the case to its trial division for a determination of the government's claims for offsets. *United States* v. *Sioux Tribe*, 616 F.2d 485, cert. denied, 446 U.S. 953 (1980).

On remand, the Tribe's attorney, Arthur Lazarus, moved for leave to withdraw as counsel of record for the Oglala Sioux Tribe, one of the two petitioners here, because that tribe had advised him that it no longer wanted a money judgment, but instead wanted its ancestral homelands returned to it. After Joe American Horse, the Oglala tribe's vice-president, contacted the trial judge concerning the motion (Pet. App. 41a), the judge wrote to American Horse in December 1980 explaining that "if the Oglala Sioux Tribe wishes to change their attorney in this litigation, they must take affirmative action by filing with me a motion for substitution of attorney."

Id. at 42a-43a. The Oglala tribe did not do so, and the court accordingly denied the motion without prejudice. *Id.* at 37a.

Proceedings then continued in the Claims Court. It issued a series of decisions concerning the offsets, including a decision generally limiting the government's offset claims to expenditures for agricultural and educational assistance made in the late 1800s and a decision allowing the government to offset $2.7 million on account of federal land known as the Ponca land that was inadvertently incorporated into a reservation. *Sioux Tribe* v. *United States*, 7 Cl. Ct. 481 (1985). Although relatively little remained to be decided by 1985, the parties were unable to settle because the Oglala tribe and some of the other tribes refused to accept any settlement that did not provide for the return of their ancestral homelands. Pet. App. 22a. Because of the impasse, the trial court in 1985 took the unusual step of entering judgment against the United States in the amount of $39,749,700, the amount of its latest unaccepted offer, without giving notice to the parties or receiving briefs on the propriety of its action. See *ibid.*

After two of the eight tribes (the Oglala and Cheyenne River tribes) decided to appeal, Lazarus moved for leave to withdraw as their counsel. The motion was denied without prejudice after the two tribes failed to respond to it. The Federal Circuit then reversed the Claims Court's decision. *Cheyenne River Sioux Tribe* v. *United States*, 806 F.2d 1046 (1986), cert. denied, 482 U.S. 913 (1987). "Unless a case is settled with the consent of the parties," the court stated, "the duty of the court is to determine the merits and enter judgment accordingly. Where, as here, the court adopts a settlement as its judgment without consideration of the relevant evidence * * *, the court has failed to perform its obligations to determine the case on

the basis of the evidence." 806 F.2d at 1050. The court added that a trial, which would require "the introduction into evidence of vast quantities of details and minute records going back for more than a century," might not be needed on remand. *Id.* at 1053. Instead, the court suggested, "the parties may be able to stipulate the total dollar amount of various categories of offset to which the government is entitled." *Ibid.*

On remand, the parties did just that. In March 1987, a status conference was held at which representatives of the eight tribes, including American Horse, who had become president of the Oglala tribe, were advised of the court of appeals' decision. Government counsel and Lazarus then entered into a stipulation concerning the outstanding factual issues with respect to the government's claimed offsets. The stipulation "provided, in substance, that *if* the Court determined the listed categories of offsets to be allowable as a matter of law, then the dollar amounts of those offsets were agreed upon by the parties to total $3,703,892.98 as a matter of fact." Pet. App. 33a-34a. The court, which had previously ruled that $2.7 million of the claimed offsets were allowable as recovery for the Ponca land, then ruled that the additional $1 million in offsets were allowable as a matter of law as well. *Id.* at 35a. It accordingly entered judgment for $40,245,807.02 in July 1987. *Id.* at 5a.

2. Two months later, petitioners, the Oglala and Rosebud tribes, filed a motion for relief from judgment under Claims Court Rule 60(b), which parallels Rule 60(b) of the Federal Rules of Civil Procedure. The two tribes contended that the stipulation of facts that Lazarus had entered into was really a settlement that he was not authorized to accept. The six other tribes did not join the motion.

The Claims Court denied the motion. Pet. App. 17a-40a. It first concluded that the stipulation of facts was not a settlement agreement. Rather, the court explained, the stipulation merely eliminated the need for a trial of factual questions regarding the amount of the offsets that would be allowed for the government's educational and agricultural assistance to the Sioux in the late 1800s if the court determined that the offsets were permissible as a legal matter. *Id.* at 35a. The court further concluded that counsel for the Sioux had authority to enter into the stipulation because, while Lazarus had twice moved to withdraw as counsel, neither tribe had retained separate counsel in response. The court concluded that "[i]t is too late in the game to do this now." *Id.* at 38a.

3. A divided court of appeals affirmed. Pet. App. 1a-16a. Noting that the decision whether to grant a motion for relief from judgment is discretionary, the court concluded that "[t]he Claims Court did not abuse its discretion in denying the appellant tribes' motion for relief from the judgment awarding the Sioux Tribe of Indians approximately $40 million." *Id.* at 8a.

With respect to petitioners' claim that the stipulation was really a settlement agreement, the court of appeals "agree[d] with the Claims Court that entering into such a stipulation of facts was 'exactly the type of determination (*i.e.*, analysis of the evidence) that attorneys can undertake "as part of the normal conduct of litigation without the necessity for obtaining the approval of their clients." ' 14 Cl. Ct. at 103 (citing *Cheyenne River Sioux Tribe*, 806 F.2d at 1053). *See Lipp* v. *National Screen Serv. Corp.*, 290 F.2d 321, 322 (3d Cir.), *cert. denied,* 368 U.S. 835 [1961]." Pet. App. 9a. The court noted that counsel had also entered into a joint motion for entry of judgment, and held that that circumstance did not transform the stipulation of facts into a settlement agreement. *Id.* at 10a.

The court also agreed that "counsel of record for the Sioux Tribe of Indians had authority to enter into the Stipulation of Facts." Pet. App. 10a. The court noted that Lazarus's contracts with the two tribes had lapsed by the early 1980s, but also noted that his motions to withdraw as their counsel had been ignored by the tribes. *Id.* at 10a-11a. The court added that "for more than 30 years counsel vigorously and effectively pressed this case on behalf of the Sioux Indians." *Id.* at 10a. It concluded: "We agree with the Claims Court that in these circumstances, the appellant tribes were required to do something more than not renew their attorney's contracts if they wished to terminate their attorneys' authority to represent them. They should affirmatively and formally have advised the attorneys that they were terminating the attorney-client relationship, and then should have promptly moved in the Court of Claims to substitute new counsel to represent them." *Id.* at 11a.

Judge Newman, dissenting, concluded that the stipulation of facts was, in reality, a settlement agreement. In her view, under the facts of this case, including "two resolutions by the Oglala Sioux Tribal Council informing counsel that it no longer sought money damages, but wanted to pursue legal and legislative strategies to gain return of ancestral lands," Lazarus did not have authority to enter into the stipulation. Pet. App. 15a.

ARGUMENT

Contrary to petitioners' contentions (Pet. 11-15), this case presents no issue as to whether counsel may settle a case without a client's authorization. It is agreed that counsel may not do so. Rather, the issue on which the court of appeals divided was whether the stipulation of facts that counsel entered into was, in reality, under the

unique facts of this case, a settlement agreement. In our view, the Claims Court and the court of appeals correctly concluded that the stipulation was not a settlement. The stipulation merely resolved minor questions as to the amounts of certain offsets, which totalled about 2½% of the final judgment. Moreover, the stipulation was effective only if the Claims Court held that the offsets were allowable as a matter of law. In any event, the fact-specific question whether the stipulation of facts here was really a settlement agreement does not warrant review by this Court.

That is particularly so since the two petitioning tribes had many opportunities to retain separate counsel prior to entry of the final judgment, but failed to do so. The history of this litigation shows that after many years of service Lazarus twice moved to withdraw as counsel for the Oglala tribe. Despite a letter from the Claims Court in 1980 specifically advising the tribe that it would have to move to substitute counsel if it did not want to be represented by Lazarus (Pet. App. 42a-43a), the tribe did nothing. After the court of appeals issued its 1987 opinion suggesting that a trial might be avoided if counsel stipulated to certain facts, and the Claims Court held a status conference advising the tribes of that decision, they still did nothing. As the Claims Court stated, "for seven years preceding the judgment of July 30, 1987, the Oglala Sioux Tribe had an open invitation from this Court to substitute counsel, an invitation which the Tribe rejected." *Id.* at 37a. Only after final judgment had been entered did the two tribes that have petitioned retain separate counsel. The Claims Court surely did not abuse its discretion under the facts of this case by concluding that it was too late at that point for them to do so, whether or not their contracts with Lazarus had lapsed. *Ohntrup* v. *Firearms Center, Inc.*, 802 F.2d 676 (3d Cir. 1986) (if parties to a lawsuit

fail to substitute counsel, a court may require existing counsel to continue their representation even after they have been discharged). If the two petitioning tribes did not want Lazarus to represent them, and to engage in ordinary activities on their behalf such as agreeing to factual stipulations, they should have retained separate counsel earlier, as the Claims Court had instructed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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